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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 758.

NATIONAL AIRLINES, INC.,
Petitioner,

v.

THELMA SCHOLNIK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

I. Petitioner says this case brings for review the question whether the Court of Appeals erred in holding that the *Green*[1] and *McKibbin*[2] cases are no longer law. Respondent believes that before this can be reached there is a preliminary question whether the facts of the case actually raise the issue of the present validity of the *Green* and *McKibbin* cases.

Respondent believes they do not.

II. If the petition for certiorari is granted the Court will have before it the following questions:

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[1] *Green v. Chicago, Burlington and Quincy Ry. Co.*, 205 U. S. 530, 1907, which held a foreign corporation not present and suable where it conducted mere solicitation.

[2] *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 1917. Defendant was not made present in New York by the fact that a connecting railroad hauled its cars there and sold coupon tickets for passage over its lines.

(A) *Is National Airlines, Inc.* sufficiently *present in Ohio* to enable the United States District Court to take jurisdiction over its person in a tort suit that arose in Florida and is brought by a citizen of Ohio, when twice a day for six months of each year National's planes and crews make commercial flights into Ohio, both plane and crew being "leased" to Capital Airlines, Inc., for each such flight, pursuant to an interchange agreement approved by the Civil Aeronautics Board, and which, among other things, provides for Capital to sell tickets for National, and for a sharing of the revenues of the flights, and imposes upon National Airlines, Inc. sole responsibility for damage to the planes resulting from negligence of its employees?

The District Court answered this question NO. The Circuit Court answered it YES. Plaintiff-respondent believes it should be answered YES.

(B) Assuming Question (A) is answered YES *is Capital Airlines, Inc., an appropriate agent* to receive service of summons upon National Airlines, Inc., when, pursuant to the same interchange agreement, Capital provides all necessary ground services in Ohio for the said commercial flights of National's airplanes, conducts joint advertising with National of the passenger service provided by the interchange flights, solicits business and sells tickets for National in connection with the interchange flights, and maintains offices in Ohio that are listed as offices of National in National's advertising?

The District Court answered this question NO. The Circuit Court answered it YES. Plaintiff-Respondent believes it should be answered YES.

(C) Assuming Question (A) is answered YES and Question (B) is answered NO, *was Robert Denton an appropriate agent* to receive service of process on National Airlines, Inc., when on June 9, 1953, he landed at Cleveland-Hopkins Airport as pilot of a National plane flying in Ohio pursuant to the interchange agreement?

The District Court answered this question NO. The Circuit Court did not find it necessary to answer it. Plaintiff-respondent believes it should be answered YES, if it is reached.

Petitioner says this case presents a question under Rule 52 of the Federal Rules of Civil Procedure relating to the scope of review by the Circuit Court. The question is whether the District Court's finding that National Airlines, Inc., was not subject to its jurisdiction is reversible in the absence of clear error. Respondent believes no such question is presented here for the following reasons:

(a) It was not presented to the Court of Appeals.[3]

(b) Rule 52 relates to findings of fact after a trial. No trial was had in this case. The evidence was presented to the Circuit Court in exactly the same manner as to the District Court.

(c) The finding referred to by the petitioner's question was a conclusion of law, or at best a mixed conclusion of law and fact, not a finding of fact within Rule 52.

(d) The District Court's ruling was clearly erroneous.

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[3] As evidence on this point Respondent has had the briefs in the Court of Appeals certified as part of the record here.

STATUTES APPLICABLE.

—Service of Process.

Federal Rules of Civil Procedure, Rule 4 (d) provides as follows:

> "Service shall be made as follows:
>
> * * * * *
>
> "(3) Upon a * * * corporation * * * by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. * * *
>
> "(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served * * * in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Ohio General Code, Section 11290[4] provided:

> "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

—Transfer in the Interest of Justice.

28 U. S. C. A., Section 1404 (a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

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[4] We cite the Ohio General Code rather than the Revised Code because service in this case was accomplished before the Revised Code became effective.

—Venue.

Petitioner quotes as an applicable statute 28 U. S. C. A., Section 1391(c). Respondent believes this has no application to the case because it is a venue statute rather than one dealing with jurisdiction over the person of the defendant petitioner. Venue is supplied under 28 U. S. C. A., Section 1391 (a) by the residence of the plaintiff-respondent in the Northern District of Ohio, Eastern Division, and is not in issue.

STATEMENT OF CASE.

A. Litigation to Date.

—The Suit.

Plaintiff-respondent was injured on June 11, 1951, when as a passenger in a National Airlines plane in Florida, in flight from Havana to Miami, she was thrown out of her seat and injured (R. 5a, 6a).

A citizen of the Northern District of Ohio, she filed suit in the Federal Court in Cleveland on September 15, 1952, alleging that her injuries resulted from negligence of National Airlines, Inc., a citizen and resident of Florida (R. 5a, 11a).

—Summons.

Summons of National Airlines, Inc. was served on September 15, 1952, by handing it to the district sales manager of Capital Airlines, Inc. in Cleveland (R. 7a).

The defendant moved to quash the service and to dismiss the action on the ground that it was not doing business in Ohio and had not appointed an agent for receipt of service of process in Ohio (R. 8a).

A second summons was served on June 9, 1953, upon Robert Denton, pilot of a National Airlines plane that

landed at Cleveland Hopkins Airport under lease to Capital (R. 20a, 46a).

Defendant moved to quash this second summons too, on similar grounds.

—Quashed and Dismissed by District Court.

The District Court granted both motions to quash and dismissed the suit, apparently on the ground that while the defendant was engaged in a joint enterprise with Capital (R. 49a, 50a, Pet. 20), and while it did conduct "limited activities" (R. 49a, Pet. 20) in Ohio:

> "It would be imposing an unreasonable burden upon defendant to require it to defend the present suit in this forum." (R. 41a, Pet. 19.)

—Reversed by Court of Appeals.

The Court of Appeals reversed on the ground that National was doing business in Ohio (Pet. 31) and had the necessary minimum contacts with the Ohio forum so that suit against it there would not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U. S. 310, 316 (Pet. 30). The Circuit Court left it to be determined by the District Court under 28 U. S. C. A., Section 1404(a), whether it would be an unreasonable burden for defendant to be required to defend the suit in Ohio (Pet. 31).

B. National's Contacts and Presence.

There are many facts establishing that National is doing business in and has the necessary "minimum contacts" with Ohio.

—Equipment Interchange.

To make better use of their planes and in effect to lengthen the route over which each may provide service, National Airlines, Inc. and Capital Airlines, Inc. have entered into an equipment interchange agreement (R. 21a to 41a). This provides for some of National's planes to be leased to Capital at Washington en route from Miami to Detroit, and to be returned to National at Washington on the return flight. This occurs daily from May to October each year. Reciprocally, Capital's planes are leased to National for flights from Washington to Miami and back from November to April (R. 23a).

—National Does Business in Ohio.

Petitioner asserts that because of this "leasing" of the planes and crews to Capital for the flight into Ohio, National Airlines is not operating planes or doing business in Ohio.

It may be that to the extent other provisions of law require one or the other to be "*the* operator," Capital is *it* rather than National; but whether National is doing business in Ohio or has sufficient "contacts, ties or relations" with Ohio does not depend upon such technicalities. The contract itself acknowledges that at least in some sense the lessor is "operating": it refers to each party not only "when operating as lessee" but also "when operating as lessor" (R. 28a, 30a).

If, in any sense, Capital is the sole "operator" of National's planes in Ohio, then National must be its agent for paying the crews, providing gasoline, oil and insurance, providing maintenance of the flight equipment, and providing a portion of the passenger service expense, for these

expenses are listed (R. 30a) as lessor's expenses for which National is to be reimbursed by Capital (R. 31a to 33a).

But the reimbursement is not a sure thing. The lessor is to be reimbursed only to the extent that the revenues are sufficient to pay the expenses of both parties (R. 28a to 30a). On the other hand, if the revenue is more than sufficient the lessor receives 45% of the surplus (R. 32a).

Thus the lessor takes a risk in hope of a profit.

Surely this is doing business.

—Capital is National's Agent in the Joint Enterprise.

To make it possible for National to profit as lessor the contract provides that Capital, as lessee, will provide and bear the expense of ground operations, ground equipment maintenance and depreciation, indirect equipment maintenance, passenger service, traffic and sales and general and administrative expenses (R. 28a to 30a).

Since the contract creates a duty on the part of Capital to provide these services and pay these expenses so that National may hope to profit from the flights into Ohio, there is a sense in which Capital is the agent of National. The Court of Appeals so found as to the solicitation and sales (Pet. 30). The intermingling of interests and the mutuality of agency led the District Court to conclude that there was a joint enterprise between National and Capital (Pet. 20, R. 49a, 50a).

—National Risks Loss of Equipment.

There are other significant aspects of the operation. The contract explicitly provides that

> "the lessor (and not the lessee) shall be responsible for loss of or damage to lessor's aircraft and equipment while leased hereunder" (R. 37a).

The meaning of this clause is illuminated by the exception that follows:

> "except that the lessee shall be liable to the lessor for loss of or damage to lessor's aircraft or equipment, provided such loss or damage (1) occurs when the aircraft and equipment are on the ground and are not taxiing in or out with respect to a flight, and (2) occurs as a result of negligence on the part of the lessee or its employees." (R. 37a.)

In other words, although Capital has "absolute" or "exclusive" operational control (R. 27a), it is never responsible for any loss of equipment that results from the negligence of National's employees. It is responsible only for negligence of its own employees, and even then only if the plane is at rest on the ground after taxiing in and before taxiing out. Even for negligence in the exercise of Capital's "absolute" or "exclusive" "operational control" while the plane is in flight Capital is not responsible. This is completely explicit:

> "* * * it being the intention of the parties that the lessor assumes all responsibility for loss of or damage to aircraft and equipment when such aircraft and equipment are on 'ramp to ramp' time in connection with a flight." (R. 37a.)

Here again National assumes a risk in exchange for a hoped for profit.

—Year-round Business in Ohio. Advertising, Sales and Office.

Another aspect of the joint enterprise is that through it National's business in Ohio extends the year round. This is so not only because the interchange agreement creates a continuing, on-going relationship between National and Capital that runs year after year and takes

National's planes there every summer. It is true for the additional reason that some of National's activities in Ohio continue even during the six months when its planes do not fly there. The through flights from Cleveland to Miami are announced at Cleveland Hopkins Airport as "Capital-National" flights, even in the winter season (R. 42a). Even in the winter season tickets are sold in Cleveland for the through flight, and National receives part of the revenue of the flight even though, under the interchange agreement, the entire trip is made with Capital planes. National's advertising literature is carried into Cleveland by Capital planes (R. 16a, 42a). This advertising matter includes National's schedules, which include Pittsburgh, Detroit, and Cleveland (R. 17a and Exhibit 1,[5] attached to Foreman's original deposition). The National Airlines Schedule (Exhibit 1, attached to Foreman's deposition) contains a page headed with the caption "Reservations—Ticket Offices." Under this caption, opposite the name "Cleveland, Ohio," appear the words "Cleveland-Statler Hotels, Phone Orchard 1-1621." The fact that these are the offices of Capital Airlines, Inc. does not alter the fact that National holds out to the public that they are its offices too.

—Conclusion of Fact.

The massive, unavoidable *fact* that controls the decision of this case is that National Airlines, Inc., the petitioner, is doing business in Ohio.

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[5] The original Exhibit is certified here as part of the record.

SUMMARY OF ARGUMENT.

National claims that its planes and crews are in Ohio under lease to Capital Airlines, Inc., so that National does not operate them. It also claims that Capital's activities in Ohio on National's behalf are no more than those considered by the Supreme Court in what it says are analogous cases involving connecting railroad carriers, *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264 (1917); and solicitation by a railroad, *Green v. Chicago, Burlington and Quincy Ry. Co.*, 205 U. S. 530 (1907).

To these claims of National Airlines the Circuit Court made two replies: first, that the rulings of *Green* and *McKibben* are no longer a correct statement of the law, having been changed by later decisions of the Supreme Court (Pet. 28, 29); and second, that under those decisions National is present in Ohio, even without operating the planes (Pet. 29), by reason of the fact that Capital not only solicits business for National in Ohio but also makes contracts of carriage over National's lines and collects payment therefor, and the fact that coupled with these activities are the operations under the lease, carried on continuously over a period of years as a regular part of National's business (Pet. 30).

Petitioner National Airlines asks review of the Circuit Court's ruling. It complains that the Circuit Court erred in holding that the *Green* and *McKibbin* cases are no longer law, and in holding that petitioner is doing business in Ohio and is subject to the jurisdiction of an Ohio federal court. Petitioner urges that the law on *Green* and *McKibbin* is in such a state of confusion that this Court should seize this opportunity to clarify it.

The *Green* case held that mere solicitation of business by a foreign corporation does not manifest a sufficient

corporate presence to support a court's jurisdiction over its person. The *McKibbin* case held a railroad was not made present in New York by the fact that a connecting carrier hauled its freight cars there and sold coupon passenger tickets good over its lines.

Respondent believes the Circuit Court was right in looking to "minimum contacts" that would satisfy "traditional notions of fair play and substantial justice," rather than to the metaphysical concept of "presence," and that in this sense the *Green* and *McKibbin* cases are no longer law.

But respondent believes that such a holding was unnecessary to the decision of this case because the facts are such that even under *Green* and *McKibbin* National is present and suable in Ohio.

Thus if there is disagreement among lower courts as to the present validity of *Green* and *McKibbin* so that the law cries for clarification, still this case is not an appropriate vehicle for such enlightenment. Whatever could be said in this case about *Green* and *McKibbin* would be dictum, not binding law.

The writ of certiorari should be denied.

ARGUMENT.

—Green and McKibbin Cases Below.

Petitioner urges that the writ of certiorari should be issued because, it says in effect, the Circuit Court went off the deep end, exceeded its authority, in saying:

> "The rule applied in the *Green* and *McKibbin* cases has been materially changed by later decisions of the Supreme Court." (Pet. 28.)

and in referring to:

> "the strongly prevailing view that the earlier rulings of the Supreme Court in the *Green* and *McKibbin* cases are no longer a correct statement of the law." (Pet. 29.)

Clearly the Circuit Court was right in these statements. It is clearly true that the test of jurisdiction is no longer the metaphysical concept of "presence," but rather whether the defendant has such minimum contacts with the territory of the forum that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U. S. 310, 316.

But further defense of these statements we leave to the opinion of the Court of Appeals itself.

For the Court of Appeals did not say that the *Green* and *McKibbin* cases were overruled in the sense that cases having the same facts would produce different results today. There was no occasion for it to go to this length, for the facts in the present case are very different from those of the *Green* and *McKibbin* cases and would surely support jurisdiction under the *Green* and *McKibbin* cases themselves.

Petitioner quotes (Pet. 1) the opinion below in such manner as to create an impression that the Court of Ap-

peals said that the *Green* and *McKibbin* cases were analogous to the present one. This is not true. The Court of Appeals said only that petitioner (appellee below) *contended* they were analogous. (Pet. 27.)

—The Green Case.

Green v. Chicago, Burlington & Quincy Ry. Co., 205 U. S. 530 (1907), is the classic case holding that "mere solicitation" by the defendant does not support a court's jurisdiction over it. If there were nothing more, the fact that Capital Airlines not only solicits business for National but also sells tickets for it would distinguish our present case from the *Green* case. But there is far more.

If the use of Capital's certificated route by National Airlines can be likened to use by one railroad of another's tracks, the *Green* case could be likened to our present case only if the Chicago, Burlington & Quincy Ry. Co. had regularly sent its trains, including its locomotives and crewmen, to Philadelphia on the tracks of, for example, the Pennsylvania Railroad, receiving a part of the fare or freight for the service thus provided, and if by contract the Pennsylvania had provided the Burlington with roundhouse repair service, fuel, water, and other terminal services. The distinctions between the *Green* case and the one now before the Court are plain.

—The McKibbin Case.

In *Philadelphia and Reading Ry Co. v. McKibbin*, 243 U. S. 264 (1917), one element brings the case a little closer to the present one. But not very much. In the *McKibbin* case cars of the defendant passed onto the tracks of the Central Railroad of New Jersey and were hauled by it into New York.

But the Reading locomotives did not go to New York. Neither did its crewmen.

If the Reading received any compensation for the use of the freight cars, we assume that was the fixed daily rental that we understand is regularly charged for cars away from their home lines. The opinion makes it clear that so far as freight and passenger revenues are concerned the Reading received nothing except what was earned on its own tracks. It did not share, as National Airlines does, the risk of lack of business or the hope of profit when business was good on the lines of its connecting carrier.

Thus the present case is very different from the *McKibbin* case. There is far more activity to support the Court's jurisdiction than there was there.

—No Issue as to Present Validity of Green and McKibbin Cases.

On the facts of the present case, therefore, it is impossible for this Court to issue a binding rule as to the present validity of the *Green* and *McKibbin* cases. Anything it chose to say on this question would be sheer dictum.

—The Bodinger Case.

The petitioner gives a partial quotation from *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176, 181 (1955):

> "* * * this court has urged alertness to resist 'extension * * * of jurisdiction * * * in the Federal system' * * *" (Pet. 7.)

The full sentence thus abbreviated from the *Bodinger* case is as follows:

> "It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the Federal system."

Petitioner urges that "the decision below foretells substantial enlargement in the diversity jurisdiction of the Federal courts."

We gather that the Circuit Court felt that to accept the petitioner's arguments would be an unauthorized reduction of jurisdiction in the Federal system.

To say, as petitioner says (Pet. 7), that the Circuit Court's decision:

> "authorizes suits against rail carriers and airlines, not only where they operate, but wherever their equipment and goods travel under lease over connecting lines and wherever business over their lines is solicited by a connecting carrier"

is to ignore the facts we have outlined above.

—The Davis Case.

Another instance of convenient omission occurs in the petitioner's quotation (Pet. 7) from *Davis v. Farmers Co-operative Equity Co.*, 262 U. S. 312, 317 (1923). The full quotation is as follows, the words omitted by the petitioner being italicized:

> "Ordinary effective administration of justice does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, *and in which the plaintiff does not reside.*"

Thelma Scholnik sues as a resident of Ohio.

If this is not a sufficient distinction, note that the word of Mr. Justice Brandeis in this quotation is "*re-*

quire." This is very different from "permit." The word "require" was chosen advisedly because in the *Davis* case the Court was considering whether justice required a burden upon interstate commerce that it found was imposed by a Minnesota statute that abrogated the *Green* case. No issue has been raised in our present case of burden upon interstate commerce. We are concerned with what suits justice permits, not what it requires.

—The Bank of America Case.

Petitioner cites *Bank of America v. Whitney Central National Bank,* 261 U. S. 171 (1923), in which constructive presence through agents was held not to support a court's jurisdiction. This too is readily distinguished on its facts, for the defendant had no place of business in New York that it held out as its own and its employees were not regularly present in New York, as National's are in Ohio. Moreover, what the Court regarded as the corporation's incapacity to be present through agents seems inherently contradictory to the modern understanding that a corporation cannot act except through agents, and the well founded statement of the Court of Appeals in the present case that:

> "With respect to a corporation, its presence without the state of its origin is manifested only by activities carried on in its behalf by those who are authorized to act for it." (Pet. 26, 27.)

—The District Court Cases.

Citing many District Court cases (Pet. 12, 13), petitioner urges that this Court should issue the writ sought in order to declare the law authoritatively on *Green* and *McKibbin,* and thus prevent a vast waste of effort and an even vaster confusion and uncertainty that the petitioner

paints into its picture of the present state of the law. If it could achieve such a result, this Court should make haste to do so. But so far as this case is concerned, we submit the Court can make haste only by waiting for a better one. This is so not only because the facts here would not support a ruling on *Green* and *McKibbin,* as we have shown above, but it is so also because the "ever-vexatious," "oft-litigated but never settled," "difficult," and "thorny" state of the law on jurisdiction over foreign corporations is inherent in the facts. For wherever the jurisdictional lines are drawn there are bound to be borderline cases. Even the rules of "mere solicitation" and "solicitation-plus" produced much litigation. The yearning for simplicity is a natural one, but simplicity cannot be achieved in a complex economy. Thus the cases cited by petitioner on pp. 12 and 13 of its brief nearly all turn upon their facts. Many of them recognize the fact that the *International Shoe* case, 326 U. S. 310, and others following it, have modified the law, but hold simply that the facts did not fall within even the enlarged—if it is enlarged—area of jurisdiction. Few, if any, of those cases would have been decided differently, we submit, even by the Circuit Court whose ruling is now sought to be reviewed.

We agree that

> "the machinery of the law ought to be so sure and certain that litigant and counsel may know what court is open to them." (Pet. 15.)

But the present case is not a likely instrument to make it so.

CONCLUSION.

This case brings for review a decision clearly supported by the facts of the case.

While there are some areas of uncertainty in the law on jurisdiction over foreign corporations, the facts here do not fall within those areas.

This is not an appropriate case in which to attempt clarification.

The writ should not issue.

Respectfully submitted,

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May 20, 1955.